1-1901-11970-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

Gretchen B. Maglich, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

v.

Miller-Dwan Medical Center,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND PARTIAL ORDER

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck beginning at 9:00 A.M. on April 27, 1999 in Room 139 of the U.S. District Court Building in the City of Duluth, Minnesota. The hearing continued on the two following days and ended on April 29, 1999. The record closed on July 15, 1999, the date of receipt by the Administrative Law Judge of the final Post-Hearing Memorandum.

Nancy J. Leppink, Assistant Attorney General, Suite 200, 525 Park Street, St. Paul, Minnesota 55103-2106 appeared on behalf of the Complainant. Thomas F. Andrew, Esq. of the firm of Brown, Andrew, Signorelli and Zallar, 300 Alworth Building, 306 West Superior Street, Duluth, MN 55802-1803 appeared on behalf of the Respondent.

NOTICE

This partial order is not the final agency decision in this case under Minn. Stat. § 182.669 for purposes of judicial review. The agency decision will be final upon issuance of an order regarding attorney fees and costs. Any person aggrieved by the final decision may seek judicial review under Minn. Stat. § § 14.63 through 14.69.

STATEMENT OF ISSUE

The issue in this contested case proceeding is whether or not the employee, Deborah Scott, had a reasonable belief that she had been assigned to work in an unsafe or unhealthful manner with a hazardous substance[1], and if so, whether she was discharged or discriminated against by the Respondent when exercising her statutory rights,[2] and if so, what damages or other relief should be awarded.[3]

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Miller-Dwan Medical Center is a non-profit specialty hospital located in Duluth, Minnesota. Its seven specialties are: rehabilitation, mental health, chemical dependency, radiation therapy, surgery, a burn center, and dialysis. Miller-Dwan has operated a dialysis unit in Duluth since 1970 and presently has satellite units in Eveleth, Grand Rapids and Superior and Ashland in Wisconsin.[4]

2. Dialysis is a process used to replace kidney function in patients who have kidney failure. During the process blood is drawn from the patient through a needle in the arm or a catheter in the shoulder area and is forced through a dialyzer or artificial kidney which is connected to a dialysis machine. The blood passes through very small hollow fibers in the dializer which removes the impurities and end products of metabolism. Patients usually visit Miller-Dwan's in-patient dialysis unit three times a week for anywhere from three to six and one-half hours.[5]

3. The dializer or artificial kidney is re-useable. Following a patient's treatment it is removed from the dialysis machine and taken to the "reuse" room at the hospital where it is tested and cleaned, filled with the sterilent Renalin and then stored for a minimum of 11 hours to insure that all organisms have been destroyed.[6]

4. The reuse room is staffed by the dialysis reuse technician who is responsible for operation of the dializer reuse equipment. The reuse technician is also involved in the preparation, cleanup and maintenance of the dialysis machine in the patient treatment area. These duties involve exposure to Renalin.[7]

5. Another position, the dialysis assistant, is also responsible for the preparation, cleanup and maintenance of the dialysis machine in the patient treatment area and the emptying of buckets and cleaning of various equipment.[8] These duties involve exposure to Renalin.

6. The Duluth dialysis unit has approximately 10 to 13 employees on each work shift. Each work shift includes nurses, patient care technicians, a unit secretary, a dialysis technician and a dialysis assistant.[9] Each work shift is eight hours long and employees work either a morning or an afternoon work shift.

7. Deborah Scott was hired by Miller-Dwan to work at its Duluth dialysis unit in 1989. She was initially hired as both a reuse technician and as a dialysis assistant. Ms. Scott graduated from high school in 1978, attended college for three years and in 1982 completed the medical laboratory technician program at the Duluth Technical Institute.[10] She obtained her Bachelor of Arts degree from the University of Minnesota at Duluth in 1995.

8. Ms. Scott worked as a medical lab technician for the Women's Health Center, Planned Parenthood, and a veterinary clinic before being hired by Miller Dwan in 1989.

9. Ms. Scott was provided on the job training when she was hired. Approximately two years after she was hired Ms. Scott began working primarily as a reuse technician, although occasionally she was scheduled to work as a dialysis assistant.[11]

10. Miller-Dwan first began using the cold sterilent Renalin in its Duluth dialysis unit in July of 1992. It is used to sterilize the dializers or artificial kidneys and the dialysis machines.[12] Prior to July of 1992 the Respondent used formaldehyde. The change was made for reasons of staff safety and comfort.[13]

11. Renalin is manufactured by the Minntech Corporation for use as a cold sterilent for dializer reprocessing. Its manufacturer states that it destroys microorganisms, viruses, bacterial spores and fungi.[14] Its active ingredients are hydrogen peroxide (20 to 24%) and peroxyacetic acid (4%).[15] It is diluted with water before use. The Renalin label states the following warning:

> DANGER – Corrosive: Can cause eye damage and skin irritation. Do not get in eyes, or on skin or clothing. Wear safety glasses or gloves when handling. Harmful if swallowed. Wash thoroughly after handling.[16]

12. The material safety data sheet (MSDS) for Renalin indicates that it can cause burns, as evidenced by a temporary whitening of the skin and that it can cause irritation to eyes, skin and mucus membranes. Under "control measures" the MSDS indicates as follows:

> Respiratory protection: Use local exhaust. If air contamination is above permitted levels, use suitable respiratory protection.
>
> Protective covering: Eyes-Glasses, goggles or face shield should be worn. Skin-Rubber or plastic gloves should be worn when handling concentrate. Protective apron should be worn when splashes or spills are likely. Rubber boots should be worn for spills.[17]

13. The MSDS also indicated that the permissible exposure limit for hydrogen peroxide is one part per million and the permissible exposure limit for ascetic acid is 10 parts per million.

14. The Respondent maintains written policies concerning the handling, preparation and disposal of Renalin as well as the air level monitoring of its components.[18] It also has written policies governing operation of the Renatron machines and the reprocessing of dializers.[19] The policies are posted in the reuse room.[20] Employees are required to review the policies as well as the material safety data sheets.[21] Material safety data sheets are maintained near the nurses' station in the dialysis unit.[22] Respondent's in-service training includes discussion of the right to know laws,[23] and general safety rules.[24]

15. When the respondent began using Renalin in its Duluth unit in 1992, its employees, including Ms. Scott, were provided in-service training by a representative of Minntech. During the training employees were instructed in how to use and handle Renalin including its purpose, how to mix it, how to use it in dializers and dialysis machines and how to clean up spills.[25] During the training the Minntech representative was asked whether it was safe to expose pregnant women to Renalin. He replied that Renalin was very safe, that you could practically drink it, and that there was no indication that it posed problems during pregnancy.[26]

16. The tasks which most directly involved Ms. Scott with Renalin occurred in the reuse room where the dializers were reprocessed or cleaned and sterilized by rinsing out residual blood and putting a Renalin solution into the dializer. The Duluth dialysis unit ran three Renatron machines which cleaned the dializers. Ms. Scott would remove the lines from the dializer and rinse them in the sink and then attach the dializers to the Renatron machine. The Renatron machine reprocessed the dializer in approximately eight minutes. Once the reprocessing was done Ms. Scott would detach the dializers from the Renatron machines by removing the connecting lines, placing clean port caps on the dializers and wiping the dializers down with a 1% Renalin solution. The dializers were then placed on the counter to be labeled. After they were labeled, Ms. Scott would put them away in the dializer storage room.[27]

17. Certain steps in the dialyzing reprocessing caused Ms. Scott discomfort because of exposure to Renalin that caused her eyes to water, her nose to burn and her throat to become sore. The Renatron machines used a 20% Renalin solution which was drawn into the machine through hoses attached to jugs stored in a cabinet under the machines. One step that caused Ms. Scott discomfort occurred when she needed to switch hoses from an empty jug to a full one and needed to dump the 20% Renalin solution from the old jug into the sink.[28] Another task that caused discomfort occurred because Ms. Scott was responsible for mixing a 20% Renalin solution. This was accomplished by placing two and one-half gallon jugs containing two liters of 100% Renalin on a cart under a vented Plexiglas awning and filling the jugs with RO water and mixing for 30 seconds.[29]

18. Additionally, each Saturday afternoon Ms. Scott would complete an “end to end” disinfect of all of the dialysis machines in the patient treatment room. To accomplish this task Ms. Scott needed to fill 14 to 16 empty two and one-half gallon Renalin jugs with eight liters of RO water and 80 milliliters of 100% Renalin. She would cap the jugs, mix them and then check the solution with a dip stick to insure that the concentration of Renalin was adequate. It took Ms. Scott approximately 20 minutes to mix the 14 to 16 jugs. She would sometimes have to leave the reuse room because her throat would burn, her nose would burn and sting, her eyes would water and she would have difficulty breathing.[30] Ms. Scott would then take the jugs to the treatment room and run the Renalin solution through the dialysis machines. She was exposed to Renalin and caused discomfort when she dropped the hoses from the dialysis machine into the jugs of Renalin solution and when she dumped the remaining Renalin solution in the sink after completing the task.[31] The entire “”end to end” process took approximately an hour and one-half to two hours.

19. A program for monthly testing of the air in the reuse room in the Duluth dialysis unit was instituted in July of 1993.[32] The staff was also instructed to test the air quality whenever they were concerned.[33] OSHA exposure limits for employees for acidic acid is ten parts per million and for hydrogen peroxide is one part per million.[34] The staff was instructed to contact the head nurse immediately if testing showed results in excess of the OSHA thresholds.[35] From 1992 to 1996 staff occasionally made complaints about irritation caused by Renalin fumes in the reuse room.[36]

20. During November 1992, a certified industrial hygenist, Norbert J. Norman, tested the air in the reuse room in response to staff complaints about odor and

irritation.[37] Although he found that exposure levels were below OSHA standards, he noted that the air supply duct was in a faulty location and recommended that it be relocated across from the dilution and Renatron exhaust hoods. He also recommended that the Renatron hood be extended to fully enclose the Renatron machines and the drip pans.[38] A follow-up survey in 1993 by Mr. Norman noted that the improvements had been completed and were helpful.[39]

21. During 1993 three reuse room tests showed levels of hydrogen peroxide in excess of the OSHA standard and in 1994 two monthly tests showed levels in excess of the standard.[40] Mr. Norman tested the outpatient treatment room for hydrogen peroxide on January 5, 1994 due to concerns about exposure, and concluded that the airborne concentration of hydrogen peroxide and acetic acid were both extemely low.[41]

22. The recorded test results for 1995 showed two occasions when the hydrogen peroxide exposure was 3.0 parts per million. On each occasion the retest shortly after the first results produced numbers within the OSHA exposure limits. On one occasion in 1996, on May 12, 1996, Ms. Scott recorded a test result of three plus parts per million for hydrogen peroxide.[42] Because Ms. Scott did not report her test results to the head nurse, no retest was done.[43] Ms. Scott conducted the May 12, 1996 test while performing a Saturday "end to end" disinfect for the dialysis machine. She was having difficulty breathing and was experiencing severe irritation in her eyes, nose and throat along with nausea and headache.[44] Ms. Scott was a few weeks pregnant at the time of this test.[45]

23. At a staff meeting on June 17, 1996, staff complained that the reuse room ventilation was inadequate for the Renalin mixing process. As a result of the complaint a special hood was designed and installed in the mixing area in July of 1996.[46]

24. In early October of 1996 Dan Skorich, a patient care technician, told Scott at work that he had some information that he thought might interest her. Skorich had recently attended an in-service training for the new Superior dialysis unit conducted by a representative from Minntech. Skorich told Scott that the Minntech representative was asked by an employee about exposure to Renalin while pregnant. In response that the Minntech representative took out a letter that stated that because of the absence of studies, Minntech recommended that pregnant women not work with Renalin.[47] At this time Ms. Scott was six months pregnant and was experiencing pre-term labor and nausea.[48] Ms. Scott completed her shift and telephoned Minntech the next day from her home. She asked for a copy of the Minntech letter discussed at the meeting and it was faxed to her on October 14, 1996.[49]

25. The letter reads as follows:

> "April 9, 1993
>
> To Whom It May Concern ®
>
> Re: Exposure of Pregnant Personnel to Renalin
>
> Questions are occasionally asked regarding whether pregnant personnel should work with Renalin.® We have in the past, and

again recently, referred this question to a medical consultant specializing in occupational medicine. (see attached letter of March 11, 1993). Findings of the resulting independent toxicology review do not show any studies which indicate a human reproductive hazard from hydrogen peroxide, peracetic acid or ascetic acid, which are the active ingredients in Renalin®.

However, the absence of current studies indicating human reproductive hazards from Renalin® is not an absolute assurance of its safety. **THEREFORE, MINNTECH RECOMMENDS THAT AS A PRUDENT PRECAUTION, EXPOSURE TO RENALIN®, AND ALL OTHER SUCH CHEMICALS, SHOULD BE AVOIDED DURING PREGNANCY.**

Yours truly,

(Signed)

Douglas A. Luehmann
Vice-President
Reprocessing Products[50]

26. Attached to the letter was a copy of a March 11, 1993 letter from Dr. Richard Cohan of the Occupational Medicine Department of Park Nicollet Medical Center to Minntech which concluded that there were no studies which would indicate a human reproductive hazard from hydrogen peroxide, peracetic acid or acetic acid. He noted that hydrogen peroxide had some mixed results when tested in animals in that it did not cause birth defects in mice or rats but in one study was weakly embryotoxic and teratogenic to chick embryos.[51]

27. Ms. Scott was concerned after reading these letters because she was six months pregnant and had already had exposure to Renalin during her pregnancy. She proceeded to try to obtain additional information about Renalin by researching on the internet and calling organizations but found little information.[52] She then called Pam Elde at Miller-Dwan about her concerns. She also met with Elde and April Johnson during her next shift. During this meeting Ms. Scott requested that she be relieved of the tasks of reprocessing dializers, mixing and dumping Renalin and the Saturday “end to end” disinfect of the dialysis machines. Elde and Johnson agreed to her request.[53]

28. Ms. Scott also called Brad Peterson, a chemical engineer with Minntech whose telephone number she had obtained from a friend. Peterson told Scott that there were no studies on the synergistic effects of Renalin’s active ingredients. He also stated that Minntech did not allow its pregnant employees to be exposed to Renalin. According to Peterson, pregnant Minntech employees were not even allowed into the clean room next to the area where Renalin is manufactured. He stated that he would not want his wife to work around Renalin if she were pregnant.[54]

29. On October 16, 1996 Minntech provided a letter to Miller-Dwan for distribution to its employees concerning Renalin and pregnant personnel. The letter read as follows:

> October 16, 1996
>
> Dear User:
>
> I recently received a call from your facility director regarding her concerns about the effects of Renalin® exposure on your pregnancy. I would like to take this opportunity to provide you with some background on Renalin® exposure testing and Renal Systems' recommendation that pregnant personnel should avoid exposure to Renalin® cold sterilant.
>
> Although Renal Systems recommends that exposure to Renalin® and all chemicals be avoided during pregnancy, we do so solely as a precautionary measure. Please be assured that since Renalin® was introduced in 1983, there have been absolutely no reported incidents of human reproductive problems or defects resulting from exposure to Renalin®. I have enclosed a copy of an independent toxicology review that confirms these findings.
>
> Our past experience has been that pregnant healthcare workers who work with Renalin® will generally inquire about the possible effects of exposure early in their pregnancy. For this reason, our policy has been to issue information regarding exposure of pregnant personnel to Renalin® only in response to a customer inquiry.
>
> Again, I would like to stress that in the past thirteen years of Renalin® use, there have been absolutely no reported incidents of human reproductive problems or defects as a result of exposure to Renalin® cold sterilant. Because Renal Systems prefers to take a conservative, precautionary approach when it comes to the health and well-being of employees and patients who use our products, we have in the past recommended that healthcare personnel and our own manufacturing employees avoid exposure to Renalin® and all other chemicals during their pregnancy. However, you may want to contact your personal physician to determine what is right for you.
>
> Please feel free to call me directly at 1-800-328-3345 if you have any further questions or concerns about Renalin®.
>
> Sincerely,
>
> (signed)

Shawn Grady
Business Unit Manager
Reprocessing Products[55]

A copy of this letter was provided to Ms. Scott.

30. Three Miller-Dwan employees who worked in the reuse room or as a patient care technician related to Scott problems that they had had during their pregnancies while working with Renalin. These problems included pre-term labor, hypertension, severe headaches, and prolonged nausea.[56] Additionally, Dan Skorich told Ms. Scott about a nurse who worked in the Eveleth dialysis unit who had significant problems during her pregnancy.[57]

31. On October 23, 1996 Ms. Scott submitted a written request to the respondent for a temporary change in her work responsibilities. The written request read as follows:

October 23, 1996

To: Pam Elde, Director, Dialysis/ICU

From: Deb Scott, Dialysis Technician

Subject: Exposure to Renalin cold sterilant

I am writing to request a temporary change in my work responsibilities. This request is made after reviewing a letter written by Minntech Corporation stating that they recommend that pregnant women, including their own employees, not work with their product Renalin. Although Minntech heralds the quality and safety of Renalin, they advise on the side of prudence and caution when it comes to exposing pregnant employees.

Although there is no indication in the MSDS report listing any ill effects to humans from each of the three active ingredients, there are no studies of these active ingredients when combined, as they are in Renalin. My other concern is what the long term effects are on the children whose mothers have been exposed to Renalin. Again, there is no data to address this issue. I have also made inquiries into Minntech's method of gathering statistical information regarding pregnancy complications, but as of this writing, I have not received any reply regarding this.

This century is full of incidents and tragedies of chemical exposure and ingestion of substances initially sworn to be safe, then later labeled as societal villains. But later is exactly that – too late.

I am concerned that Renalin is not as benign as we would like to believe. Five female employees of child bearing age, myself included, have experienced difficulties throughout their pregnancies, the most common being premature contractions requiring lifting restrictions, and periodic rest at work in order to avoid the use of medications in conjunction with complete bed rest at home. Other symptoms have been hypertension,

severe headaches, and nausea beyond what is typically considered the "normal" period for morning sickness.

Three of the children born to the above mentioned women have had respiratory problems in infancy. Out of a total of eight pregnancies between five women, only two have been uncomplicated, and one of those pregnancies occurred before the use of Renalin. This particular employee's two subsequent pregnancies were very difficult, requiring brief periods of hospitalization.

I do not believe that my request for a temporary change in work responsibilities is unreasonable or unfounded, given the warning by the manufacturer of Renalin as well as my personal experience and that of my co-workers. As a mother, my primary responsibility is to my children. I am their nurturer, their first teacher, and their protector; it is my responsibility to ensure that they grow up happy and healthy. Since I do not feel that my concerns can be adequately addressed, I feel that it is in this baby's best interest to heed Minntech's caution and not continue to expose him and myself to Renalin. There is nothing in this world that is worth risking my children's health, and since there is insufficient long term data, when it comes to a human being, I am choosing to follow Minntech's recommendation.

Sincerely,

(signed)

Deborah Scott[58]

32. In October of 1996, Ms. Scott met with a nurse practitioner who worked with her obstetrician. Ms. Scott showed the nurse practitioner the letters from Minntech and the nurse practitioner told Scott that she thought it was advisable that she not continue to expose herself to Renalin.[59]

33. On November 7, 1996 Ms. Scott met with Ms. Elde, Ms. Johnson and Jerry Zanko, Miller-Dwan's Human Resource Manager. They advised Ms. Scott that Miller-Dwan's investigation had revealed no pregnancy risk by exposure to Renalin. Ms. Scott was provided with the following letter at the meeting:

November 7, 1966

Dear Deb,

The purpose of this letter is to respond to the concerns you detailed in your October 23, 1996 memo to me regarding Renalin exposure during pregnancy.

As you are aware, Miller-Dwan has never considered exposure to Renalin, within MSDS and OSHA guidelines, a safety concern for our pregnant employees. Our recent knowledge of the existence of Minntech's letter dated April 9, 1993 has prompted further investigation.

In addition to Minntech's April 9, 1993 letter and their response to my inquiry dated October 16, 1996, we have reviewed:

- Dr. Jed Downs, Occupational Medicine, opinion (attachment)
- Dr. Richard Cohan, Occupational Medicine, opinion
- Renalin MSDS information
- OSHA Standards
- Dialysis community standards.

A complete review of this data does not indicate that working with Renalin during pregnancy poses a risk to either a pregnant employee or her unborn child. Therefore, you are directed to resume your usual dialysis technician duties, with the exception of those precluded by your current lifting restriction.

I know the time since we became aware of Minntech's letter of April 9, 1993 has been very difficult for you and am sorry for the personal hardship you have endured. If you are unwilling to resume your full scope of duties at this time, a voluntary LOA is available to you. This option is being made available to you because of the emotional distress assuming the full scope of your duties may cause you.

As in the past, Miller-Dwan continues to give your safety and the safety of all Miller-Dwan employees the highest priority. We will continue to seek clarification from Minntech regarding their recommendation on this important issue.

Sincerely,

(signed)

Pam Elde
Director Critical Care Units[60]

Attached to the letter was a memo from Dr. Jed Downs which stated that neither hydrogen peroxide or peracetic acid would build up in concentrations able to cross the placental barrier and, therefore, would not harm the developing fetus.[61] The Downs memorandum did not address what could happen if a pregnant woman is exposed to Renalin at levels exceeding OSHA exposure limits and did not address the synergistic effect of the ingredients in Renalin.[62]

34. A telephone survey of other dialysis programs by Ms. Elde found that seven other hospitals in Minnesota took no special precautions for pregnant employees working with Renalin. One, Abbott Northwestern, stated that pregnant employees were not assigned to dializer reuse duties, but only upon employee request.[63]

35. On November 8, 1996 Ms. Scott had a scheduled appointment with her obstetrician, Dr. Stephan Guttormsson. She told him her concerns about Renalin and he reviewed the information including the Minntech letters and Dr. Cohan's report.[64]

Dr. Guttormsson advised Ms. Scott that she should not be exposed to Renalin.[65] It was Dr. Guttormsson's opinion that it would be hard to ignore the bold faced typed instructions of the manufacturer that pregnant women should not be exposed to this compound. He noted that most human studies committees won't allow studies on pregnant women so there is an absence of data about reproductive hazards. Dr. Guttormsson suggests that if there is a concern about a substance it should be avoided during pregnancy.[66]

36. Mr. Norman sampled the air in the reuse room again on November 8 and 12, 1996, to determine the concentration of hydrogen peroxide and acetic acid. He found that the airborne concentrations were within OSHA limits and that while there was a noticeable odor in the reuse room while testing, no irritant effects were noted. He observed that the single greatest source of hydrogen peroxide was from the dializers while they were drying after sterilization. He recommended either extending the Renatron hood or installing a separate hood for the drying process.[67] His testing did not take place during the Saturday "end to end" disinfect process or while the 20% Renalin solution jugs were being changed or dumped.[68]

37. On November 25, 1996 Mr. Zanko telephoned Ms. Scott to ask whether she would be resuming her reuse technician duties. Ms. Scott replied with a written memo in which she stated that she was unwilling to work with Renalin due to the precautionary statement issued by Minntech Corporation and advised the respondent that this decision was supported by her obstetrician. She stated that she was willing to continue her employment with Miller-Dwan but that the only alternative appeared to be to resign.[69]

38. In a written response Mr. Zanko advised Ms. Scott that Miller-Dwan would not accept her resignation but instead would place her on a special unpaid leave of absence as of November 8, 1996.[70] He advised Ms. Scott that her position would be held open for up to 12 weeks after the birth of her child.

39. Ms. Scott's initial reaction to being placed on an involuntary unpaid leave of absence was disbelief. She felt like she was forced to chose between her livelihood and her health.[71] The loss of income caused her to be unable to pay some of her bills and as a result she was pursued by her creditors and had to stop answering her telephone.[72]The financial problems caused stress in Ms. Scott's relationship with her partner and her son.[73] Because of insufficient financial resources she was unable to continue her work as a photographer and there was little money available for a Christmas holiday at the end of 1997 for her family.[74]

40. Had Ms. Scott not been placed upon involuntary unpaid leave of absence by Miller-Dwan she would have earned back wages, sick leave, vacation leave, health insurance benefits and pension benefits in the total amount of $3,150.40.[75]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. §§ 14.15 and 182.669.

2. The notice of hearing in this matter was proper.

3. The Department has fulfilled all relevant substantive and procedural requirements of law or rule.

4. Minn. Stat. § 182.654, subd 9 states as follows:

> No employee shall be discharged or in any way discriminated against because such employee has filed any complaint or instituted or caused to be instituted any proceeding or inspection under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of the employee or others of any right afforded by this chapter. Discriminatory acts are subject to the sanctions contained in section 182.669.

5. Minn. Stat. § 182.654, subd. 11 provides in part:

> An employee acting in good faith has the right to refuse to work under conditions which the employee reasonably believes present an imminent danger of death or serious physical harm to the employee.
>
> A reasonable belief of imminent danger of death or serious physical harm includes but is not limited to a reasonable belief of the employee that the employee has been assigned to work in an unsafe or unhealthful manner with a hazardous substance, harmful physical agent or infectious agent.
>
> An employer may not discriminate against an employee for a good faith refusal to perform assigned tasks if the employee has requested that the employer correct the hazardous conditions but the conditions remain uncorrected.
>
> An employee who has refused in good faith to perform assigned tasks and who has not been reassigned to other tasks by the employer shall, in addition to retaining a right to continued employment, receive pay for the tasks which would have been performed if (1) the employee requests the commissioner to inspect and determine the nature of the hazardous condition, and (2) the commissioner determines that the employee, by performing the assigned tasks, would have been placed in imminent danger of death or serious physical harm.

6. That Ms. Scott reasonably believed that she had been assigned to work in an unsafe or unhealthful manner with a hazardous substance.

7. That Ms. Scott reasonably believed that the conditions in respondent's work place presented an imminent danger of death or serious physical harm to her within the meaning of Minn. Stat. § 182.654, subd. 11.

8. That respondent's action in placing Ms. Scott on an involuntary unpaid leave of absence constitutes discrimination against Ms. Scott for the exercise of her rights afforded by Minn. Stat. § 182.654, subd. 11.

9. That Minn. Stat. § 182.669, subd. 1 provides in part as follows:

> In all cases where the administrative law judge finds that an employee has been discharged or otherwise discriminated against by any person because the employee has exercised any right authorized under sections 182.652 to 182.674, the administrative law judge may order payment to the employee of back pay and compensatory damages. The administrative law judge may also order rehiring of the employee; reinstatement of the employee's former position, fringe benefits, and seniority rights; and other appropriate relief. In addition, the administrative law judge may order payment to the commissioner or to the employee of costs, disbursements, witness fees, and attorney fees.

10. That complainant Deborah Scott is entitled to back pay, sick leave, vacation leave, health insurance benefits and pension benefits in the total amount of $3,150.40.

11. That Ms. Scott is entitled to compensatory damages for mental anguish and suffering in the amount of $2,000.00.

12. Minn. Stat. § 182.669 subd. 1 also provides in part as follows:

> Interest shall accrue on, and be added to, the unpaid balance of Administrative Law Judge's order from the date the order is signed by the Administrative Law Judge until it is paid, at the annual rate provided in Section 549.09, subdivision 1, paragraph (c).

13. That any Finding of Fact which is more properly classified as a Conclusion of law is hereby adopted as such.

14. The reasons for the above Conclusions of Law are set out in the Memorandum which follows and which is incorporated in these Conclusions of Law by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent, Miller-Dwan Medical Center, Inc. shall cease and desist from discriminating against any employee due to the exercise of the rights under chapter 182 of Minnesota Statutes.

2. Miller-Dwan Medical Center, Inc. shall pay to Deborah Scott total compensatory damages in the amount of $5,150.40.

3. Miller-Dwan shall pay interest to Deborah Scott on the $3,150.40 portion of the award under Minn. Stat. § 547.09, subd. 1(c) from November 8, 1996.

4. Miller-Dwan Medical Center shall remove from its files any reference to Ms. Scott's unpaid leave of absence and shall take no action that would hinder Ms. Scott from obtaining future employment.

5. Miller-Dwan Medical Center, Inc. shall post the following notice, printed in large type on 8-1/2 inch x 11 inch paper, for a period of 30 days at each of its Kidney Dialysis Units:

NOTICE TO ALL EMPLOYEES

1. An employer cannot discriminate against any worker who attempted to exercise his or her rights under Minnesota OSHA Health and Safety Law.

2. On November 8, 1996 Deborah Scott was placed on an involuntary unpaid leave of absence because she declined to work with Renalin while pregnant even though she reasonably believed that she had been assigned to work in an unhealthful manner with a hazardous substance.

3. Miller-Dwan Medical Center, Inc. has been ordered to pay Deborah Scott $5,150.40 for lost wages and other damages.

4. Miller-Dwan Medical Center, Inc. has also been ordered not to discriminate against any employee attempting to exercise his or her rights under Minnesota OSHA law.

6. The commissioner may submit a Petition for Attorney's Fees and Costs within 20 days of the date of this Order. The Respondent may file a reply within 15 days of receipt of the petition. The resulting Order will be the final decision in this matter for purposes of judicial review.

Dated this 26th day of July, 1999.

S/ George A. Beck
GEORGE A. BECK
Administrative Law Judge

Reported: Taped

MEMORANDUM

The Commissioner of the Department of Labor and Industry is asserting in this proceeding that Miller-Dwan Medical Center violated a statute that prohibits employers from discriminating against employees for exercising their rights under Minnesota OSHA law.[76] Under Minnesota OSHA law employees have the right to refuse work under the limited circumstances set out in statute.[77] Generally, an employee has the right to refuse work which the employee in good faith reasonably believes presents an imminent danger of death or serious physical harm. The statute specifically includes within a reasonable belief of imminent danger or serious physical harm, a reasonable belief that the employee has been assigned to work in an unsafe or unhealthful manner with a hazardous substance. Additionally, an employee must request that the employer correct the hazardous condition.

In order to prevail on this case the complainant must prove that when Ms. Scott refused to perform the Saturday "end to end" disinfect of dialysis machines, the mixing and dumping of Renalin, and the reprocessing of dializers, that she reasonably believed that exposure to Renalin while performing those tasks presented an imminent danger of serious physical harm to her. In addition the commissioner must demonstrate she was acting in good faith and that she had requested the employer to correct the hazardous condition but the condition remained uncorrected.[78] The commissioner must also demonstrate that Miller-Dwan discharged or took some other negative employment action against Ms. Scott because of her refusal to perform the duties.

Request to Correct the Hazard

The record demonstrates Ms. Scott asked the respondent to correct the hazardous condition but it was not corrected. She requested both orally and in writing that Miller-Dwan allow her to avoid exposure to Renalin while she was pregnant by allowing her to not perform the Saturday "end to end" disinfect of dialysis machines, the mixing and dumping of Renalin and the processing of dializers and by allowing her to perform alternate job tasks. She explained in detail to the respondent why she believed her exposure to Renalin while pregnant constituted a hazardous condition.

The purpose of the statutory requirement that an employee request the employer to correct the hazardous condition has been explained as follows:

> The requirement…that a complainant communicate the safety defect to an employer "serves to permit timely correction of the problem, thus promoting safety, to permit the employer to allay workers fears if the hazard is non-existent, and to reduce bad faith work refusals."[79]

That purpose was met in this case since Ms. Scott presented her concerns to the employer which allowed the employer to investigate the matter and attempt to allay Ms. Scott's fears. In its post-hearing brief the respondent did not argue that Ms. Scott did not communicate her concern to it.

Good Faith

The complainant argues that record demonstrates that Ms. Scott was acting in good faith when she refused to perform the duties enumerated above. The complainant cites the definition of "good faith" in Black's Law Dictionary, namely, "an honest belief, the absence of malice and the absence of design to defraud or seek an unconscionable advantage."[80] A recent ALJ decision concluded that the employee acted in good faith because he had spent several hours talking to his employer about the condition he believed to be hazardous, asked for explanations, and requested an inspection. The ALJ noted that the employee was acting in good faith because instead of just walking off the job he asked to be assigned to a different task.[81]

Similarly in this case Ms. Scott did not simply walk off the job but identified the tasks she believed were hazardous and requested that she be allowed to perform other tasks during her pregnancy. She attempted to research Renalin and sought medical advice.

The respondent argues that the record does not support a finding of good faith based upon several factual matters in the record. The most significant of these factors are that Ms. Scott did not complain to Pam Elde or April Johnson about the physical problems that she experienced while working with Renalin. However, she did complain to others and the issue was discussed at staff meetings. The employer also asserts that Ms. Scott missed most dialysis staff meetings and dialysis in-services and perhaps did not obtain information distributed at those meetings. Her performance reviews indicate she did obtain information, however. This circumstantial evidence cited by the employer is not sufficient to overcome the complainant's argument. The facts cited by the employer do not constitute malice or a design to defraud or seek an unconscionable advantage. They do not establish that her actions in October of 1996 were in bad faith. The record clearly supports the conclusion that Ms. Scott was acting in good faith about her concerns based upon her clear communication with her employer and her efforts to obtain information about the hazard.

Hazardous Substance

In its post-hearing submission the respondent argues that the commissioner has failed to prove that Ms. Scott was assigned to work in an unsafe or unhealthful manner with a hazardous substance. The complainant points out that two of the active ingredients of Renalin are listed as hazardous substances under OSHA rules.[82] Miller-Dwan points out that the rule also exempts any substance for which there is no valid and substantial evidence that a significant risk to human health may occur from exposure.[83] The employer contends that the record demonstrates that the complainant was not exposed to Renalin in amounts above the OSHA permissible exposure limit. Of course, the record indicates that the limits were sometimes exceeded and that several employees experienced noxious physical reactions to working with Renalin.

However, the employers assertion that Renalin has not been shown to be hazardous is disposed of by the language of the statute itself as well as case law interpreting similar provisions. The statute does not only allow an employee the right to refuse work which presents an imminent danger of death or serious physical harm. Rather, it specifically states that an employees may refuse to work under conditions which the employee "reasonably believes" present an imminent danger of death or serious physical harm. The complainant is therefore not required to prove that Ms. Scott was in fact in imminent danger of serious physical harm. While the nature of Renalin and its components are certainly relevant to this proceeding, whether they are in fact hazardous is not determinative.

In a similar federal case[84] a truck driver refused to continue with a trip when his truck was experiencing a loss of power on the freeway because he believed that an unsafe condition existed. The Court rejected the argument that there had to be objective evidence of an unsafe condition in order for the employee to receive the protection of the statute. The statute granted the employee protection from termination when he refused to drive "because of the employees reasonable apprehension of serious injury to himself or the public due to the unsafe condition."[85] The Court determined that congressional intent was that the objective reasonableness of the employee's perception that an unsafe condition existed be evaluated in light of the situation that confronted the employee at the time. The Court concluded that the employees had sustained his burden of proof by demonstrating that his belief that an unsafe condition existed was objectively reasonable, that he had adequately communicated the complaint to his employer, and that the employer had discharged him because of his refusal.[86]

A similar rule has been applied in the unemployment context in Minnesota.[87] The Minnesota Supreme Court held that where an employee is discharged for refusing to work, the question is whether he had reasonable cause to fear for his own safety, not whether the employee's work area was in fact safe. Accordingly, the main issue in this case is whether or not the employee had a reasonable belief based upon what she

knew at the time, that the work conditions presented an imminent danger of serious physical harm.

Reasonable Belief

The Complainant asserts that Ms. Scott reasonably believed that she was in imminent danger of serious physical harm. She points out that a dictionary definition of "reasonably believe" would be "to accept as true with reason or sound thinking." Cases interpreting a federal regulation similar to the Minnesota statute have held that the employee's apprehension of serious injury is measured by the standard of a reasonable person under the circumstances.[88] One court found as a conclusion of law that an employee discriminated against under the federal regulation "had no reasonable alternative other than to refuse the job assignment."[89]

The Complainant points out that the information available to Ms. Scott at the time she made the decision not to perform certain of her job duties, included the written recommendation from the manufacturer of the chemical in question that pregnant women should avoid exposure to it. Furthermore, Dr. Guttormsson, her obstetrician, and his nurse practitioner both advised her not to work with the chemical. In the past Ms. Scott had suffered acute symptoms while working with Renalin and she was aware that on occasion the air quality test results for hydrogen peroxide had exceeded OSHA exposure limits. In her investigation she learned that Minntech Corporation did not allow its own pregnant employees to work with Renalin. She was told that some of her co-workers had problems with pregnancies after working with Renalin. She also learned that there were no studies indicating that Renalin was safe for pregnant employees. At the time that Ms. Scott first saw the letter from Minntech she was six months pregnant and had been working with Renalin for those six months.

The Respondent argues to the contrary that a reasonable person in Ms. Scott's position would have concluded that there was no reasonable basis to believe that exposure to Renalin would present an imminent danger of serious physical harm. Miller-Dwan points out that when staff concerns were expressed about odor and irritation in the reuse room they were addressed through increased ventilation. It also points out that monthly testing usually showed a level of hydrogen peroxide and acetic acid below OSHA thresholds. It points out that the April 9, 1993 letter from Minntech stated that there were no studies indicating a human reproductive hazard from the active ingredients in Renalin. The October 16, 1996 letter from Minntech stated that there were no reported incidents of human reproductive problems or defects resulting from exposure to Renalin. Miller-Dwan believes that a reasonable person would have relied upon Dr. Downs' statement, that Miller-Dwan produced for Ms. Scott, that hydrogen peroxide was not harmful. It also asserts that the fact that almost all other dialysis units made no special precautions for pregnant employees using Renalin would cause a reasonable person not to be concerned.

The evidence in this record preponderates in favor of a conclusion that Deborah Scott had a good faith reasonable belief that she was in imminent danger of physical harm from performing the mixing and dumping of Renalin, the reprocessing of dializers,

and the Saturday end-to-end disinfect of dialysis machines. She believed she might miscarry or deliver prematurely.[90] She was concerned not only about herself, but of course about her unborn child. The existence of the 1993 letter from Minntech is likely sufficient by itself to support Ms. Scott's reasonable belief. Although it acknowledged no relevant studies existed, it also stated that the absence of studies was not an absolute assurance of the safety of Renalin. The letter then concluded by stating, in bold face and in capital letters, that **"MINNTECH RECOMMENDS THAT AS A PRUDENT PRECAUTION, EXPOSURE TO RENALIN, AND ALL OTHER SUCH CHEMICALS, SHOULD BE AVOIDED DURING PREGNANCY."**[91] This is an unequivocal warning which no pregnant woman, concerned for her unborn child, could afford to ignore.

Beyond this letter, however, Ms. Scott had other information to support her belief. In order to return to work Ms. Scott would have had to ignore the recommendation of her obstetrician who testified that in regard to pregnant women, the "reasonable belief" is that a chemical is unsafe unless it is shown to be safe. There is no evidence in the record that Renalin caused problems for pregnant women or birth defects. It would not, however, be reasonable for Ms. Scott to simply ignore the reports of problems from her pregnant co-workers. She had, herself, experienced a burning in her nose, eyes watering, and difficulty breathing while working with Renalin. Of particular concern must have been the information that Ms. Scott received from an engineer at Minntech who advised her that Minntech did not allow its own pregnant employees to work with Renalin. A reasonable person would conclude from this that there must be a possibility of an adverse effect to a pregnency or to the fetus. The Complainant's medical expert, Dr. Lohmann, agreed that it was reasonable to believe serious physical harm was imminent.[92]

Miller-Dwan did make a good faith effort to collect information about Renalin and whether or not it constituted a reproductive hazard. However, the information that it gathered was not adequate to overcome Ms. Scott's reasonable belief. The fact that there had been past problems with ventilation of the reuse room would be little comfort since complaints were still being made during 1996. The assurances of Minntech in a 1996 letter that there were no reported incidents of human reproductive problems would not be particularly persuasive in light of its own policy of not allowing pregnant employees to work with Renalin. The findings of Dr. Cohan in 1993 merely indicated again that no studies were available. Dr. Downs' brief November 1, 1996 memo gave his opinion of the individual components of Renalin but did not address how they would act together synergistically.

This is not a case where an employee made an impulsive or ill-considered decision not to perform her job. To the contrary, Ms. Scott set out in writing to the employer why she was concerned and highlighted the Minntech letter, the lack of studies, and co-workers' problems.[93] Again, in her November 25, 1996 memo Ms. Scott advised Miller-Dwan why she felt the response of Dr. Downs was inadequate to meet her concerns. She carefully researched the effect of Renalin and evaluated the information provided by her employer. Her response, given all of the evidence available, was a rational one.

The Respondent also argues that it is protected from the finding of discrimination in this case by the decision *in Armstrong v. Flowers Hospital*, Inc. a Title VII civil rights case.[94] In that case the Court held that a pregnant nurse was not entitled to alternative duties where her job duties included working with AIDS patients. The Respondent suggests Ms. Scott is asking not to be protected from discrimination but to be granted preferential treatment over other similarly situated employees. The Respondent believes she should not be granted the right to refuse individual case assignments.

Armstrong was a disparate impact pregnancy discrimination case brought under Title VII of the Federal Civil Rights Act. The plaintiff in that case had the burden of proof to show that the adverse impact of termination fell disproportionately on pregnant employees, but could not do so. However, this case is not a Title VII discrimination case, but is based on a specific Minnesota Occupational Safety and Health statute that affords an employee the right to refuse work under certain limited conditions. It grants rights to the employee different from and more specific than Title VII of the Federal Civil Rights Act of 1964.

Accommodation

Finally, Miller-Dwan asserts that there is no requirement in Minnesota OSHA law that an employer provide a reasonable accommodation to an employee through an altering of job duties. Again, however, the Respondent relies upon Title VII case law dealing with pregnancy discrimination. Although the OSHA discrimination law is silent on the issue of accommodation, it is quite clear that an employer may not discriminate in this situation. It should be noted that Miller-Dwan initially accommodated Ms. Scott's request for a reassignment of certain job duties, then later directed Ms. Scott to resume all of the job tasks and then placed her on an unpaid leave of absence when she refused to do so. The statute requires an employer to allow an employee to not perform job tasks that the employee reasonably believes presents an imminent danger of serious physical harm and to otherwise continue her employment. Exactly how the employer is to arrange its workforce is not specified in the statute. However, that does not negate the prohibition against discrimination.

Damages

The parties have stipulated that Ms. Scott would have earned wages, sick leave, vacation leave, health insurance benefits and pension benefits worth $3,150.40 had she not been placed on an involuntary leave of absence. Precedent for back pay awards exists.[95] Since liability has been found, those damages are awarded. The Complainant also seeks an award of compensatory damages for Ms. Scott for her mental anguish and suffering.[96] The record indicates that Ms. Scott, an employee with good performance reviews, was put in the difficult position of having to choose between her livelihood and her health and the health of her unborn child. The gap created by the loss of income caused some bills to go unpaid resulting in harassment by creditors and stress in her relationship with her partner. There were insufficient resources for a Christmas holiday in 1997. Additionally, Ms. Scott was surprised and hurt that her employer would fail to make a relatively modest adjustment of her work schedule in

light of a possible hazard to her unborn child. In light of all these circumstances an award of $2,000.00 for mental anguish and suffering is appropriate.

The OSH discrimination statute specifically allows for payment of costs, disbursements, witness fees and attorney fees to the Complainant or the employee.[97] Should the Complainant wish to do so, she may file a petition for costs and attorney fees within 20 days of the date of this order. The Respondent may respond to the petition within 15 days of receipt.

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[1] Minn. Stat. § 182.654, subd. 11
[2] Minn. Stat. § 182.654, subd. 9
[3] Minn. Stat. § 182.669
[4] T. 273-74
[5] T. 275
[6] T. 276
[7] Respondent's Ex. 20
[8] Respondent's Ex. 21
[9] T. 21, 277
[10] T. 17
[11] T. 33-34
[12] T. 21-22
[13] T.285-286
[14] Respondent's Ex. 5, p. 1.
[15] Complainant's Ex. 36, 38
[16] Complainant's Ex. 36
[17] Complainant's Ex. 35, p. 3
[18] Respondent's Ex. 33, pp. 1-11.
[19] Respondent's Ex. 33, pp. 12-41.
[20] T. 294
[21] Respondent's Ex. 36.
[22] T. 301
[23] Respondent's Ex. 28.
[24] Respondent's Exs. 39-43
[25] T. 27-28
[26] T. 28-29
[27] T. 51-52, 63-64; Respondent's Ex. 20.
[28] T. 53-54, 59-60
[29] T. 54-58, Complainants Ex. 38
[30] T. 65-69
[31] T. 72
[32] Respondent's Ex. 26, p. 2; T. 378
[33] T. 476
[34] Complainant's Ex. 43
[35] T. 477
[36] Respondent's Ex. 26, T. 198, 247, 380, 398
[37] Respondent's Ex. 10
[38] Respondent's Ex. 10, p. 3
[39] Respondent's Ex. 27
[40] Respondent's Ex. 26
[41] Respondent's Ex. 28
[42] Respondent's Ex. 46

[43] T. 203-204
[44] T. 85, Complainant's Ex. 43, p. 2
[45] T. 76
[46] Respondent's Ex. 26
[47] T. 105-106
[48] T. 76
[49]T. 106-109, Complainant's Ex. 51
[50] Complainants Ex. 51, p. 2
[51] Complainant's Ex. 51, pp. 3-4
[52] T. 112-113; Complainant's Exs. 15, 54
[53] T. 114-115, 214
[54] T. 116-119
[55] Complainant's Ex. 44, p. 2
[56] T. 126-128, 249-250, 260-261
[57] T. 127-128
[58] Ex. 52
[59] T. 124-125
[60] Ex. 50, page 1-2
[61] Ex. 50, page 3
[62] T. 131
[63] Respondent's Ex. 31; T. 329
[64] T. 411-413
[65] T. 413-414, 133-134
[66] T. 414-415; 424
[67] Respondent's Ex. 29
[68] T. 513-523
[69] T. 137; Complainant's Ex. 47
[70] T. 178; Complainant's Ex. 46
[71] T. 179
[72] T. 181-182
[73] T. 182
[74] T. 181
[75] Stipulation of the Parties
[76] Minn. Stat. § 182.654, subd. 9; see Conclusion of Law No. 4
[77] Section 182.654, subd. 11; see Conclusion of Law No. 5
[78] *Gonzales v. West End Iron and Metal*, 915 F. Supp 1031 (D. Minn 1996)
[79] Yellow Freight Systems, Inc. v. Reich 38, F. 3d 76, 84, n. 11(2d Cir. 1994)
[80] Black's Law Dictionary 693 (6th Ed. 1990)
[81] Commissioner v. International Bildrite, OAH Docket No. 69-1901-8180-2 at p. 12 (Jan 4, 1994)
[82] Minn Rule pt. 5206.0400, subp. 5
[83] Minn Rule pt. 5206.0400 , subp. 2(I)
[84] Yellow Freight Systems, Inc. v. Reich, 38 F. 3d 76 (2d Cir. 1994)
[85] 38 F 3d at 82.
[86] 38 F 3d at 85.
[87] Ferguson v. Department of Employment Services, 247 N.W.2d 895 (Minn. 1976)
[88] Whirlpool Corp. v. Marshall, 445 US 1, 3-4 (1980); Dole v. HMS Direct Mail Service, Inc., 752 F.Supp. 573, 576 (W.D. N. Y. 1990)
[89] Firestone Tire and Rubber Company, (CCH) ¶24,566 (OSHA Rev. Comm. 1980)
[90] T. 138
[91] Finding of Fact No.25
[92] T. 158-59
[93] Finding of Fact No. 31
[94] 33 F. 3d 1308 (11th Cir. 1994)
[95] Whirlpool Corp., supra., f.n. 88.
[96] See Gillson v. State Dept. of Natural Resources, 492 N.W. 2d 835, 842(Minn. Ct App. 1992)
[97] Conclusion of Law No. 9